Filed 2/25/19 In re M.B. CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

In re M.B., a Person Coming Under the Juvenile Court Law.	H045708 (Santa Clara County Super. Ct. No. JD023785)
SANTA CLARA COUNTY DEPARTMENT OF FAMILY AND CHILDREN'S SERVICES, Plaintiff and Respondent, v. K.F. et al., Defendants and Appellants.	

In this dependency action, the parents of M.B. seek reversal of the juvenile court order terminating their parental rights based on noncompliance with state law implementing the federal Indian Child Welfare Act. (ICWA; 25 U.S.C. § 1901 et seq.) Father argues substantial evidence does not support the court's findings regarding ICWA compliance because respondent failed to adequately inquire and provide complete notice to the tribes of which M.B. may be a member. Mother argues more specifically that the social worker failed to adequately investigate M.B.'s possible Chickasaw ancestry. For the reasons stated here, we will conditionally reverse the judgment to permit the juvenile court to comply with ICWA's inquiry and notice provisions incorporated into Welfare

and Institutions Code sections 224.2 and 224.3.[1] (Undesignated statutory references are to the Welfare and Institutions Code.)

I. BACKGROUND

The Santa Clara County Department of Family and Children's Services filed a juvenile dependency petition on behalf of M.B. when she was five weeks old and taken into protective custody following her parents' arrests for possession of methamphetamine and child endangerment. At that time, appellants were living with father's 77-year-old aunt and 92-year-old grandmother. The petition alleged appellants' substance abuse and criminal histories placed M.B. at risk, preventing either from caring for her. The allegations were found true, M.B. was declared a dependent of the court and placed in foster care, and reunification services were ordered for appellants.

According to an Indian child inquiry attachment to the petition, the social worker had spoken with M.B.'s mother who reported no Indian ancestry. Father claimed possible Cherokee ancestry at the initial hearing, and the court directed the social worker to provide ICWA notice. The social worker later reported father also claimed possible Chickasaw ancestry, and in March 2016 sent notice of the dependency proceeding to the Cherokee Nation, the Eastern Band of Cherokee Indians, the United Keetoowah Band of Cherokee Indians in Oklahoma, and the Chickasaw Nation. Notice was also sent to the BIA Sacramento Area Director and the Secretary of the Interior in Washington D.C.

The Cherokee Nation, the Eastern Band of Cherokee Indians, and the Chickasaw Nation returned letters stating that M.B. was not an Indian child as defined by ICWA. Each explained its determination was based solely on information provided in the ICWA notice, and any incorrect or omitted information could invalidate the determination. The

[1] The Legislature amended several sections of the Welfare and Institutions Code related to ICWA effective January 1, 2019. (Assem. Bill No. 3176 (2017-2018 Reg. Sess.).) Among the amendments, section 224.2 was revised and recast as section 224.3, and section 224.3 was revised and recast as section 224.2. (Assem. Bill No. 3176, §§ 4–7.) Our statutory references are to the code sections as *currently* numbered.

Chickasaw Nation further explained its enrollment criteria required documented lineage to a person whose name appeared on the Dawes Commission Rolls[2] (enrollment was open between 1898 and 1906) and reported that no file was found for M.B.'s family. The correspondence invited the family members identified on the ICWA notice to submit a CDIB application[3] supported by birth and death certificates to determine whether they were "of Chickasaw decent." No response was received from the United Keetoowah Band of Cherokee Indians, the BIA, or the Interior Department.

The juvenile court's order following the jurisdiction and disposition hearing included a finding that the court had inquired and found ICWA notice proper. At the initial six-month review hearing, the court found ICWA did not apply, and that finding was restated in later orders.

Reunification services were terminated at the 12-month review hearing, and mother's writ petition challenging that order was denied by this court. (*K.F. v. Superior Court* (Dec. 5, 2017, H044851 [nonpub. opn.].) The juvenile court denied section 388 petitions filed by mother and father requesting M.B.'s return to their care with family maintenance. At the selection and implementation hearing held in March 2018, the juvenile court terminated parental rights and freed two-year-old M.B. for adoption. The parents filed notices of appeal from the orders denying their respective petitions and

[2] Congress created the Dawes Commission in 1893 to negotiate with the Creeks, Cherokees, Choctaws, Chickasaws and Seminoles in Indian territory to enable the creation of a state or states by extinguishing tribal land title. (Act of March 3, 1893, ch. 209, § 16, 27 Stat. 645; *Choctaw Nation of Indians v. U.S.* (1943) 318 U.S. 423, 425, fn. 5.) The commission was empowered "to hear and determine applications for citizenship" and to complete citizenship rolls for the tribes. (*Garfield v. U.S ex rel. Goldsby* (1908) 211 U.S. 249, 258.)

[3] A CDIB is a certificate of degree of Indian blood of a federally recognized Indian tribe issued by the Bureau of Indian Affairs. (*United States v. Rainbow* (8th Cir. 2016) 813 F.3d 1097, 1103.)

terminating their parental rights.[4] Because the termination order "necessarily subsumed a present determination of ICWA's inapplicability," and the validity of the order "is necessarily premised on a current finding by the juvenile court regarding compliance with ICWA's notice requirement," the ICWA challenges presented here are timely. (*In re Isaiah W.* (2016) 1 Cal.5th 1, 11, 15.) Appellants' failure to raise ICWA compliance to the juvenile court does not act as a waiver or otherwise preclude appellate review. (*Id.* at p. 13.)

II. DISCUSSION

The Indian Child Welfare Act provides minimum federal standards a state court must follow when removing an Indian child from his or her family, and the California Legislature has incorporated ICWA's requirements and definitions into state law. (*In re Abbigail A.* (2016) 1 Cal.5th 83, 88, 92.) To assure compliance with ICWA, a dependency court must inquire of the parties whether there is reason to know that the child is an "Indian child," as defined by ICWA. (25 U.S.C. § 1903(4) [defining Indian child as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe"]; §§ 224.1, subd. (a), 224.2, subds. (a)–(c).) If there is reason to believe an Indian child is involved in a dependency proceeding, the court or social worker must inquire regarding the possible Indian status of the child. (§ 224.2, subd. (e)(1)–(3).) The duty to inquire is both affirmative and continuing, and applies to the social services agency and the court. (§ 224.2, subd. (a).) The social services agency is obligated "to make a meaningful effort to locate and interview extended family members to obtain whatever information they may have as to the child's possible Indian status." (*In re K.R.* (2018) 20 Cal.App.5th 701, 709.) The juvenile court

[4] Appellants do not claim error or seek relief as to the orders denying their section 388 petitions. Any challenges to those orders are therefore deemed abandoned. (See Cal. Rules of Court, rule 8.316.)

"has a responsibility to ascertain that the agency has conducted an adequate investigation and cannot simply sign off on the notices as legally adequate without doing so." (*Ibid*.)

Notice of the proceeding must be sent to all tribes of which the child may be a member or citizen, or eligible for membership or citizenship. (§ 224.3, subd. (a)(3)(A).) The notice "shall include … [a]ll names known of the Indian child's biological parents, grandparents, and great-grandparents, or Indian custodians, including maiden, married, and former names or aliases, as well as their current and former addresses, birth dates, places of birth and death, tribal enrollment information of other direct lineal ancestors of the child, and any other identifying information, if known." (§ 224.3, subd. (a)(5)(C).) A tribe's determination "of whether a child is a member, is eligible for membership, or whether a biological parent is or is not a member of that tribe, is solely within the jurisdiction and authority of the tribe." (Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 10153 (Feb. 25, 2015).)

A. THE JUVENILE COURT'S ICWA FINDINGS ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE GIVEN THE FACIALLY FLAWED ICWA NOTICE

Father argues that substantial evidence does not support the juvenile court's ICWA findings because the ICWA notice omits some paternal information, and information regarding M.B.'s maternal lineage is entirely lacking. He cites authorities (*In re Francisco W.* (2006) 139 Cal.App.4th 695; *In re N.G.* (2018) 27 Cal.App.5th 474) conditionally reversing and remanding for the juvenile court and social services agency to comply with ICWA when inquiry and notice are deficient.

The appellate court in *In re Francisco W.* conditionally reversed a judgment terminating parental rights with directions to order the social services agency to comply with ICWA's notice provisions. (*In re Francisco W.*, *supra*, 139 Cal.App.4th at p. 711.) In that case most of the boxes on the ICWA notice were checked "unknown," including the date and place of birth of the paternal grandfather identified as Cherokee, despite the social worker's access to the paternal grandmother who also identified as Cherokee.

(*Id*. at pp. 699–700.) The appellate court found deficient notice even though the Cherokee tribes had responded that based on the information supplied to them, none considered the child to come within ICWA's definition of Indian child.

More recently, in *In re N.G*. the appellate court conditionally reversed a judgment terminating parental rights to correct ICWA inquiry and notice deficiencies. (*In re N.G.*, *supra*, 27 Cal.App.5th at p. 486.) In that case, the record did not show what, if any, efforts the social services agency had made to discharge its duty of inquiry. Nor did it show all required notices being given or including all known identifying information. (*Id*. at p. 484.) Given those deficiencies, the burden of making an adequate record demonstrating compliance with ICWA fell squarely on the social services agency and the court. (*Ibid*.)

Respondent concedes it failed to conduct an adequate inquiry into M.B.'s maternal relatives (despite mother reporting no Indian ancestry), and informs us that it is conducting that inquiry and will send notice to the Chickasaw and Cherokee tribes which includes the resulting information. Respondent asserts the notice given contains "thorough information about paternal relatives" such that appellants cannot meet their burden to show the notice contains "anything less than all available information on the paternal side." Respondent contends any error related to M.B.'s maternal information is harmless.

The ICWA notice in the record identifies mother with a 1969 birthdate, a current address, and no Indian ancestry. The notice names mother's parents without providing addresses, or birth or death information, and it provides no names or identifying information for mother's grandparents. The notice identifies father with a 1964 birthdate, the paternal grandfather as being between 60 and 62 years old, born in California and living in Florida, with no Indian ancestry. The paternal grandmother is identified by name, with a Texas street address, born in Mississippi in 1956, and associated with the Chickasaw and Cherokee tribes. Detailed information is provided for the paternal great-

grandmother with whom appellants were living when M.B. was removed from their care, including a 1923 date of birth and current address. The other paternal great-grandparents are identified by name; Mississippi is shown as the current address and place of death for the other great-grandmother; one of the paternal great-grandfathers is shown as deceased in "1969 or 1986"; and the other great-grandfather is identified as born in 1944, living in Mississippi, and deceased in 2006. The biographical information for each great-grandparent includes the Chickasaw and Cherokee tribes.

After carefully reviewing the record, we conclude that respondent has failed to demonstrate compliance with ICWA's inquiry and notice provisions. In particular, our attention is drawn to the affirmative representations on the ICWA notice pertaining to M.B's paternal lineage showing inaccurate and conflicting information. According to the notice, M.B.'s paternal grandmother (father's biological mother) was born in 1956, making her 8 years older than her son (born in 1964), and M.B.'s paternal grandfather is "60-62 years old," making him at most 10 years older than his son. The notice shows a paternal great-grandfather born in 1944, making him 12 years older than father's mother and 10 to 12 years older than father's father, one of which is his biological child. The notice provides two years of death for M.B.'s other great-grandfather, nearly 20 years apart. M.B.'s paternal great-grandparents all are associated with the Cherokee and Chickasaw tribes, even though the notice shows her paternal grandfather having no Indian ancestry. Finally, father and the paternal grandfather share the same surname, but none of the paternal great-grandparents share that name. (One of the paternal great-grandfathers shares a surname with the living great-grandmother, and the other with the living great-grandmother's maiden name.)

Given the facially deficient notice, we cannot assume respondent fully complied with its inquiry obligation. (*In re K.R.*, *supra*, 20 Cal.App.5th at p. 709.) The only inquiry in the record regarding M.B.'s paternal ancestry is the social worker's communication with father's adult daughter (M.B.'s half-sister) who claimed no Indian

ancestry. That was before father identified himself as having Native American ancestry and does not satisfy respondent's duty to inquire further.

The notice discrepancies we have identified reflect a lack of care in securing and conveying accurate information, contrary to ICWA and California's implementing statutes. Given the caveat expressed by each responding tribe regarding accurate information, together with the absence of a response from the United Keetoowah Band of Cherokee Indians, the juvenile court's ICWA compliance findings cannot be upheld. The conditional reversal employed in *In re Francisco W.* and *In re N.G.* is appropriate here. Given our conclusion that the ICWA notice was prejudicially deficient as to M.B.'s paternal lineage, it is unnecessary for us to determine whether the conceded deficiencies in M.B.'s maternal information were also prejudicial.

B. THE CHICKASAW NATION'S RESPONSE DOES NOT TRIGGER FURTHER INQUIRY

In light of the ongoing duty to inquire whether a child in dependency proceedings may be an Indian child, mother argues that the Chickasaw Nation's response to respondent's ICWA notice "specifically listed what familial information was necessary for its search," including a CDIB application, and without respondent providing that information to the tribe, the tribe was unable to make "a meaningful determination as to [M.B.'s] tribal membership eligibility." Mother posits that respondent could have provided the tribe further information regarding the paternal great-grandparents omitted from the ICWA notice.

Mother's argument is based on the incorrect premise that the Chickasaw Nation was requesting additional information in order to determine whether M.B. came within ICWA's definition of an Indian child. To the contrary, the Chickasaw Nation verified that M.B. was not an Indian child under ICWA; its comment that it cannot accurately verify tribal membership or eligibility without specific documentation was not a request for additional information to support that determination. The invitation to father's family

to complete a CDIB application was an invitation to demonstrate enrollment eligibility. As we have already noted, respondent has the duty to undertake a meaningful inquiry and provide the tribe with all *known* names and information regarding M.B.'s direct lineal ancestors, and we expect respondent to comply with that duty on remand. But that duty does not require respondent to submit an application for enrollment or for a certificate of degree of Indian blood on behalf of M.B. or any member of her family. (See *In re Abbigail A.*, *supra*, 1 Cal.5th 83, 90–92 [invalidating rule of court requiring the juvenile court to " 'proceed as if the child is an Indian child and direct the appropriate individual or agency to provide active efforts … to secure tribal membership for the child' " if a tribe informs the court that the child is eligible for membership provided certain steps are followed].)

III. DISPOSITION

The judgment terminating parental rights is conditionally reversed. The matter is remanded to the juvenile court with directions to comply with the inquiry and notice provisions of ICWA and sections 224.2 and 224.3. On remand, the court must ensure respondent fully investigates M.B.'s ancestry and gives new ICWA notice reflecting all known information.

If, after receiving ICWA notice as required by sections 224.2 and 224.3, the tribes and the designated agent for the Secretary of the Interior do not respond to the notices, or respond that M.B. is not an Indian child, the judgment terminating parental rights to M.B. shall immediately be reinstated and further proceedings shall be conducted, as appropriate. If any tribe determines M.B. is an Indian child, the court shall proceed accordingly.

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Grover, J.

WE CONCUR:

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Greenwood, P. J.

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Danner, J.